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[U.S. Court of Appeals, Eleventh Circuit, Filed August 24, 1982. Norman E. Zoller, Clerk]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-7614

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH,
Plaintiff-Appellant,

versus

L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 25, 11 Cir., 1982, ___F.2d___).

Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

*Judge, 5th Circuit Court of Appeals, sitting by designation.

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
United States Circuit Judge

REHG-6

Rebecca A. MACHETTI, a/k/a Rebecca A. Smith, Plaintiff-Appellant,

v.

L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, Defendant-Appellee.

No. 81-7614.

United States Court of Appeals,

Eleventh Circuit.

June 25, 1982.

Habeas petitioner appealed from a decision of the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, 517 F.Supp. 1076, denying her petition. The Court of Appeals, Hatchett, Circuit Judge, held that state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending notice to the jury commissioners deprived petitioner of her right to an impartial jury trial.

Reversed and remanded with directions.

1. Habeas Corpus 25.1(3, 4)

Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. 28 U.S.C.A. § 2254.

2. Habeas Corpus 45.1(4)

Where state habeas court entertains federal constitutional claims on the merits, the federal habeas court must also adjudicate the merits. 28 U.S.C.A. § 2254.

3. Grand Jury 2½
Jury 33(1.1)

Constitutional guarantee of the right to an impartial jury also embraces a right that grand and petit juries be selected at random so as to represent a fair cross section of the community. U.S.C.A.Const.Amend. 6.

4. Constitutional Law 213.1(1)

Prima facie case of an equal protection violation may be rebutted by proving an absence of discriminatory purpose or that such purpose did not have a determinative effect. U.S.C.A.Const.Amends. 5, 14.

5. Jury 33(1.1)

Since systematic disproportion alone establishes a prima facie claim that a jury did not represent a fair cross section of the community, rebuttal evidence focuses on the significant state interest which justifies the imbalance. U.S.C.A.Const.Amend. 6.

6. Grand Jury 2½
Jury 33(1.5)

Evidence that the traverse jury list from which habeas petitioner's jury was drawn was composed of only 18 percent women and that the grand jury list contained only 12 percent women, although the county's population was comprised of 54 percent women, constituted an adequate prima facie showing that the jury did not represent a fair cross section of the community. U.S.C.A.Const.Amend. 6; 28 U.S.C.A. § 2254.

7. Habeas Corpus 85.5(12)

Habeas petitioner's proof sufficiently established that the underrepresentation of women in the jury selection

process in her case was due to a state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners. Ga.Code, § 59-124 (Repealed); U.S.C.A.Const.Amend. 6; 28 U.S.C.A. § 2254.

8. Jury 33(1.5)

State jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners deprived habeas petitioner of her right to an impartial jury trial. 28 U.S.C.A. § 2254; Ga.Code, § 59-124 (Repealed); U.S.C.A.Const.Amends. 6, 14.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal requires a review of the principles of constitutional law governing the fair cross-section requirement of jury composition. We hold that Georgia's jury selection procedure violated appellant's sixth and fourteenth amendment right to an impartial jury trial and reverse and remand to the district court, 517 F.Supp. 1076, with directions to issue the writ of habeas corpus.

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*Honorable Joe M. Ingraham, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

I. BACKGROUND

Appellant, Rebecca Machetti, seeks federal habeas corpus relief under 28 U.S.C. § 2254 (1977), from two consecutive death sentences. The sentences were imposed by the Superior Court of Bibb County, Georgia, following her February, 1975, jury conviction for two murders. On appeal, the Supreme Court of Georgia affirmed the convictions and sentences and denied her petition for rehearing. *Smith v. State*, 236 Ga. 12, 222 S.E.2d 308, *cert. denied, Smith v. Georgia*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 302 (1976), *rehearing denied*, 429 U.S. 1055, 97 S.Ct. 771, 50 L.Ed.2d 772 (1977). The Bibb County Superior Court denied Machetti's petition for declaratory relief and/or a new presentence hearing and for a stay of execution. After staying her execution pending appeal, the Supreme Court of Georgia denied the appeal and a motion for rehearing. *Smith v. State*, 238 Ga. 655, 235 S.E.2d 375, *cert. denied, Smith v. Georgia*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159, *rehearing denied*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 323 (1977). Georgia's high court then issued remittitur to the Bibb County Superior Court, which slated January 20, 1978, as the date of Machetti's execution. She then filed a habeas corpus petition in the Superior Court of Baldwin County, Georgia, which stayed the execution but later denied the petition. In July, 1979, the Georgia Supreme Court denied her application for a certification of probable cause to appeal and denied her motion for reconsideration.

After exhausting her state remedies, Machetti filed a petition for writ of habeas corpus in January, 1978, in the district court for the Middle District of Georgia. That court stayed her execution "until such time as her action has been finally decided in the courts of the United States." After reference to a magistrate, the district court

denied Machetti's petition. *Machetti v. Linahan*, 517 F.Supp. 1076 (M.D.Ga.1981).

Machetti was convicted on February 28, 1975, of two counts of murder in the brutal slaying of her ex-husband, Joseph Ronald Akins, and his wife, Juanita. Machetti planned the murder so that her three teenage daughters might receive the benefits of their father's insurance policies. At the sentencing hearing, Machetti's attorney introduced no new evidence but begged the jury to find mitigating factors without suggesting any such circumstances. The jury recommended death on both counts, and the court sentenced Machetti to two consecutive death sentences.

Evidence received at the state habeas hearing showed that the traverse jury list from which Machetti's jury was drawn was composed of only 18% women, despite a 1970 census showing that women comprised 54% of Bibb County's adult population.[1] The grand jury list contained only 12% women. Thus, the absolute disparity between the adult female population of Bibb County and the grand jury list was 42%, and 36% with respect to the traverse jury list.[2] Appellee, L. Q. Linahan, Warden of the Georgia Women's Correctional Institution, concedes the accuracy of these statistics. At the time of jury selection, Ga.Code Ann. § 59-124 (repealed 1975) provided that any woman who did not wish to serve on a jury could "opt-out" merely by sending written notice to the

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[1] Appellant was convicted and sentenced by a twelve-member petit jury which included one woman.

[2] Absolute disparity is one method used to calculate disparity. Absolute disparity measures representativeness by the difference between the proportion of the population and the proportion of the underrepresented category in the jury box. Kairys, Kadane & Lehoczky, *Jury*

jury commissioners.[3] Potential women jurors in Bibb County automatically received cards allowing them the opportunity to exempt themselves from service.

II. ISSUE

We must decide whether appellant was indicted and convicted by juries drawn from a venire which unconstitutionally excluded and underrepresented women.

III. JURY COMPOSITION

[1, 2] Machetti's counsel first raised the jury composition issue at the state habeas corpus hearing.[4] She contends that the operation of section 59-124 systematically excluded women from the venire; and therefore, she was indicted by a grand jury and convicted by a traverse jury drawn from jury boxes in which women were unfairly underrepresented. Machetti thus contends that the Georgia jury selection procedure deprived her of her right to

Representativeness: A Mandate for Multiple Source Lists, 65 Cal.L. Rev. 776, 790 (1977).

[3] Ga.Code Ann. § 59-124 (1965) (repealed 1975) provided:

Exemption of women who do not desire to serve.—Any woman of this State who does not desire to serve upon juries shall notify the jury commissioners of the county in which she resides in writing to that effect, and thereupon the jury commissioners shall not place the name of such woman in the jury box for said county. 1953 Ga. Laws Nov.Sess., pp. 284, 288 (repealed 1975).

[4] Generally, a federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. *Francis v. Henderson*, 425 U.S. 536, 541-42, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976); *Stewart v. Ricketts*, 451 F.Supp. 911, 913-14 (M.D.Ga.1978). A Georgia decisional rule in force at the time of appellant's trial in February and March, 1975, mandated that result. Where, however, the state habeas court entertains the federal constitutional claims on the merits, as in the instant case, the federal habeas court must also adjudicate the merits. *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9, 95 S.Ct. 886, 891 n.9, 43 L.Ed.2d 196 (1975); *Newman v. Henderson*, 539 F.2d 502, 504 (5th Cir. 1976).

a fair trial by jury of a representative segment of the community. The district court upheld the selection process.

[3] Fundamental to our system of justice is the principle that the sixth amendment grants criminal defendants the right to an impartial jury. This guarantee also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527-30, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975); *United States v. Perez-Hernandez*, 672 F.2d 1380, at 1384 (11th Cir. 1982). Also relevant to our inquiry is the notion that

> the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of a difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

Ballard v. United States, 329 U.S. 187, 193-94, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946) (footnote omitted). Moreover, as the Supreme Court more recently stated, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493, 503, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972).

In *Taylor*, the Supreme Court held unconstitutional a state "opt-in" statute which automatically excluded women from the jury list unless they chose to be included by filing a written request for jury service. *Taylor* estab-

lished that the "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. at 538, 95 S.Ct. at 702, *quoted in Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981). In contrast to the statute involved in *Taylor*, Ga.Code Ann. § 59-124 was an "opt-out" statute that automatically included women unless they opted not to serve. The Georgia legislature repealed this statute shortly after the Court decided *Taylor*.

In January, 1979, one year after the filing of Machetti's federal habeas corpus petition, the Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held unconstitutional a state opt-out statute which also exempted women from jury service on request. In setting forth the elements of a prima facie violation of the fair cross-section requirement, the Court required the defendant to show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364, 99 S.Ct. at 668.

In this case, the magistrate suggested that Machetti met the first two criteria required by *Duren*. The magistrate further suggested, however, that Machetti failed to satisfy the third requirement of establishing that the underrepresentation of women was due to their systematic exclusion in the jury selection process. Nevertheless, the magistrate stated that the operation of Georgia's opt-out

statute caused the disproportionate representation of women in Machetti's case. The magistrate suggested that Machetti had failed to satisfy the third prong because it was not until 1979 that the Supreme Court in *Duren* declared that states could not constitutionally permit all women to opt out from jury duty solely on the basis of sex. He thereby implied that the *Duren* holding that Missouri's opt-out statute constituted "systematic exclusion" was not retroactive. Alternatively, we read this finding to assume that the opt-out statute alone is insufficient prima facie evidence of systematic underrepresentation. The magistrate thus stated that Machetti failed to present any other evidence establishing that the sexual imbalance in Bibb County's venire was due to systematic exclusion of women in the jury selection process.

The district court held that *Duren* could not be applied retroactively on collateral review and that Machetti was therefore not entitled to relief. The court noted that because *Duren* is not applicable to Machetti's collateral attack, that it was not necessary for the magistrate to consider whether the circumstances of this case satisfied the *Duren* requirements. Although declining to adopt the magistrate's recommendations on this issue, the district court adopted the magistrate's suggestion that Machetti failed to show that anything other than Georgia's opt-out statute contributed to the underrepresentation of women on the jury list. The court thus implicitly acknowledged that Machetti demonstrated that section 59-124 caused the unconstitutional exclusion of women.

Machetti argues that the district court erred because *Duren*, decided some four years after her trial, must be applied retroactively to her case. In *Lee v. Missouri*, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed.2d 736 (1979) (per

curiam), the Supreme Court held that *Duren* is retroactively applicable to a jury sworn after the decision in *Taylor* because *Duren* did not establish any new principles of constitutional law not already settled by *Taylor*. 439 U.S. at 462, 99 S.Ct. at 711. Appellee concedes that *Lee* requires the retroactive application of *Duren* to this collateral attack. Appellee, however, requests this court to remand the instant case to the district court for consideration of whether the facts herein meet the three-prong test of *Duren*.

We find no just reason for a remand under the present circumstances. Machetti has remained on death row for seven years pending the resolution of these legal proceedings. Appellee has admitted that no questions of fact remain, that no additional relevant factual evidence exists, that no evidence controverts the facts established by Machetti, and that the statistics presented are accurate. The only questions remaining are whether, as a matter of law, the disparity herein violates the sixth amendment and whether the operation of Ga.Code Ann. § 59-124 constituted "systematic exclusion." We thus examine whether, as a matter of law, Machetti established a prima facie fair cross-section claim based on the exclusion of women.

[4-6] It is undisputed that women are a recognizable, distinct class under the first element of the prima facie case. There is no doubt that the relevant statistics satisfy the second criteria of unfair underrepresentation. The absolute disparity between the percentage women in the general adult population (54%) and on the 1975 petit jury list (18%) is 36%, whereas a 42% disparity existed with respect to the percentage of women on the grand jury list (12%).[5] The Supreme Court has never fashioned

[5] Although the census figures relied on were five years old at the time of appellant's trial, the Supreme Court has previously accepted

precise mathematical standards for gauging systematic exclusion. *See Alexander v. Louisiana*, 405 U.S. 625, 630, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 (1972). Nevertheless, Supreme Court and Fifth Circuit precedent provide some guidance as to the magnitude of disparity needed to establish a prima facie cross-section claim. The variance here is sufficiently disproportionate to fall within the approximate boundaries delineated in cases holding that the statistical disparities established prima facie violations.[6] *See, e.g., Duren*, 439 U.S. at 360, 99 S.Ct. at 666 (38%); *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (23%); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (14%); *Porter v. Freeman*, 577 F.2d 329 (5th Cir. 1978) (20.4%); *Preston*

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six-year-old data as adequate proof of the percentage of the distinctive class in the community. *Duren v. Missouri*, 439 U.S. 357, 365 & n.24, 99 S.Ct. 664, 669 & n.24, 58 L.Ed.2d 579 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 627, 92 S.Ct. 1221, 1223, 31 L.Ed.2d 536 (1972). Furthermore, no evidence exists in the record to indicate that the 1970 census data "significantly distorted" the percentage of women in Bibb County at the time of trial so that the figures were of questionable relevance. *Duren*, 439 U.S. at 357, 99 S.Ct. at 664, 58 L.Ed2d 579.

[6] Some of the cases relied on for establishing the benchmark percentages to raise a prima facie claim of discrimination in jury selection involved equal protection challenges. The standard for proving a prima facie violation is virtually identical under both the fair cross-section and equal protection analyses. *United States v. Perez-Hernandez*, 672 F.2d 1380, at 1384 n.5 (11th Cir. Apr. 15, 1982).

Different evidence, however, is relevant to rebutting each challenge. A prima facie case of an equal protection violation may be rebutted by proving an absence of discriminatory purpose or that such purpose did not have a determinative effect. *Castaneda v. Partida*, 430 U.S. 482, 493-95, 97 S.Ct. 1272, 1279-1280, 51 L.Ed.2d 498 (1977). Discriminatory purpose is irrelevant to a fair cross-section claim which focuses solely on the composition of the venire. Since systematic disproportion alone establishes a prima facie cross-section claim, the rebuttal evidence focuses on the significant state interest which justifies the imbalance. *Duren v. Missouri*, 439 U.S. at 367-68 & n.26, 99 S.Ct. at 670-671 & n.26.

v. Mandeville, 428 F.2d 1392 (5th Cir. 1970) (13.3%). We hold that appellant's statistical evidence constituted an adequate prima facie showing for the purpose of establishing a fair cross-section violation.

As to the third requirement, the magistrate's recommendation stated that Machetti failed to establish that the underrepresentation of women in the final pool was due to their systematic exclusion in the jury selection process. As noted above, the magistrate impliedly based this finding on the erroneous premise that the declaration in *Duren* that states could not constitutionally permit all women to opt out from jury duty solely on the basis of sex did not apply to this case. The magistrate conducted a *Duren* analysis, yet refused to apply its holding on the ground that *Duren* is not retroactively applicable. The magistrate also distinguished *Taylor*, decided one month prior to appellant's trial, which involved a statute that automatically excluded women from jury lists because they failed to opt-in whereas this case involved an opt-out statute, as in *Duren*. *Lee*, however, indicates that *Duren* merely clarified *Taylor* and that the constitutional standards enunciated in *Taylor* retroactively apply here, even though *Duren* was decided approximately four years after Machetti's jury trial.

Moreover, the magistrate explicitly found that "[*t*]*here can be no doubt* that the underrepresentation of women in [Machetti's] case was caused by Ga.Code Ann. § 59-124." In stating that the magistrate need not have decided the constitutionality of the jury composition under *Duren* because it was not retroactively applicable to this collateral attack, the district court never repudiated this proposed finding. In fact, the court implicitly agreed that Machetti met the third-prong in *Duren* by adopting the portion of the magistrate's proposed finding that Ma-

chetti "failed to show that anything other than Ga.Code Ann. § 59-124 contributed to the underrepresentation of women in said jury boxes." 519 F.Supp. at 1080. Not only did the district court agree that the disparity resulted solely from the operation of Georgia's opt-out statute, but at oral argument appellee concurred in this view, conceding that no further evidence exists of the cause of the disproportionate representation of women.

[7, 8] We hold that the Machetti's proof sufficiently established that the underrepresentation of women resulted from their systematic exclusion in Georgia's jury selection procedure. Her undisputed showing that this significant disparity occurred over a period of twenty months, from February, 1974, through September, 1975, unmistakably indicates that the cause of the imbalance was inherent in the jury selection procedure under Ga. Code Ann. § 59-124. *Duren* established that the existence of an opt-out system, as embodied by statute, in conjunction with the resulting disproportionate and consistent exclusion of women from the final jury pool was prima facie evidence of systematic exclusion of women. 439 U.S. at 366-67, 99 S.Ct. at 669-70. Moreover, appellee introduced no evidence to rebut Machetti's case. We therefore conclude that the Georgia jury-selection system in effect at the time of Machetti's trial deprived her of her sixth and fourteenth amendment right to an impartial jury trial.

Because the jury composition issue is dispositive, we need not reach the additional issues presented.[7]

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[7] Machetti has also presented issues involving the effective assistance of counsel at the sentencing phase; the validity of Georgia's death penalty statute as applied to appellant; and whether the death penalty was applied arbitrarily and discriminatory on the grounds of race and poverty.

IV. CONCLUSION

We do not establish absolute limits on jury composition which would automatically authorize finding a constitutional violation. We merely hold that the percentage of women on the Bibb County jury lists should more closely approximate the percentage of women in the adult community and that 36% and 42% absolute disparities resulting from the operation of Georgia's opt-out statute are unconstitutionally excessive. We therefore reverse and remand to the district court with directions to issue the writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS.

[Filed at 11:20 A.M., June 29, 1981, Helen F. Newberry, Deputy Clerk, U.S. District Court, Middle District of Georgia.]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, *Petitioner,* vs. L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, *Respondent.*	CIVIL ACTION NO. 79-210-MAC

OWENS, District Judge:

Petitioner seeks federal habeas corpus relief under 28 U.S.C.A. § 2254 (1977). She requests that this court grant a writ of habeas corpus or, in the alternative, hold a full evidentiary hearing on all issues which she has presented and then grant a writ of habeas corpus.

This case has been under consideration in one form or another by state and federal courts in excess of a total of six years. Petitioner was convicted of two counts of murder in the Superior Court of Bibb County on March 1, 1975. Following a jury trial she received two consecutive death sentences. On direct appeal her sentences and convictions were affirmed by the Georgia Supreme Court. *Smith* v. *State*, 236 Ga. 12 (1976), *cert. denied*, *Smith* v. *Georgia*, 429 U.S. 932 (1976). A petition for rehearing was denied on January 10, 1977. On January 13, 1977, petitioner filed a petition for a declaratory judgment and/or presentence hearing and stay of execution in the Bibb County Superior Court. This petition was denied, and the denial was affirmed by the Supreme Court of Georgia. *Smith* v. *State*, 238 Ga. 655 (1977), *cert. denied*, 428

U.S. 910 (1977), *rehearing denied*, 429 U.S. 87 (1977). Petitioner, on January 9, 1979, then filed a petition for a writ of habeas corpus in the Superior Court of Baldwin County, Georgia. After a two-day hearing that petition was denied on May 9, 1979. A notice of appeal was filed by petitioner on May 30, 1979. Her application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on July 10, 1979, and a motion for reconsideration was denied by that court on July 17, 1979. The petition under consideration was filed in this court on August 30, 1979, and referred to the United States Magistrate who issued proposed findings of fact and conclusions of law on March 24, 1981. Thereafter petitioner filed her objections to those proposed findings of fact and conclusions of law.

The record before this court among other things contains transcripts of the petitioner's trial (over 1,200 pages) and state habeas corpus hearing (over 300 pages); a ninety-two-page order of the Honorable Joseph B. Duke denying petitioner's state habeas petition; various depositions and affidavits offered by petitioner as supportive of her contentions; over 1,200 pages of a transcript of an evidentiary hearing in *People* v. *Moore;* and, briefs of the parties regarding the instant petition.

This court has carefully considered each contention made by the petitioner. The record has been scrutinized to determine if any of the elements of § 2254(d) [1] which

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[1] 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof where parties, evidenced by a

would overcome the statutory presumption of correctness accorded the state court determination and entitle petitioner to a hearing exists. The court has been unable to find anything which would warrant such a hearing. Upon review of the petition, the record before the court, and the report of the United States Magistrate, the court finds that the allegations of deprivation of constitutional rights contained in the petition are of no merit.

Except for the Magistrate's suggestions as to whether petitioner established a prima facie case of unconstitutional jury box composition as delineated by the Supreme Court of the United States in *Duren* v. *Missouri*, 439 U.S. 357 (1979), this court approves and adopts the Magis-

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written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

trate's proposed findings of fact and conclusions of law in their entirety. The court makes the following additional comments and findings as to the issues of (1) ineffective assistance of counsel, (2) jury box composition, and (3) application of the death penalty.

(1) **Ineffective Assistance of Counsel**

Petitioner contends in her objections to the "Proposed Findings of Fact and Conclusions of Law" of the United States Magistrate (Objections) that the state habeas court's decision as to the effectiveness of her counsel was based on an invalid standard, and thus must be reconsidered in the light of a recent United States Supreme Court case establishing the standard to be used in determining whether there was effective assistance of counsel. Specifically, petitioner contends that the state habeas court used the old standard which made a distinction between retained and appointed counsel, with retained counsel being subject to a *less* stringent standard. In *Cuyler* v. *Sullivan*, 446.U.S. 335 (1980) the Supreme Court stated that the use of different standards depending on whether counsel was retained or appointed is improper; retained counsel should be subject to as stringent a standard as appointed counsel. As petitioner has noted, this standard has since been utilized by the Fifth Circuit in *Kemp* v. *Leggett*, 635 F.2d 453 (5th Cir. 1981) (Objections p. 12).

Even assuming that *Cuyler* applies retroactively to this case, a careful reading of Judge Duke's order in the state habeas proceeding shows that his decision as to the effectiveness of petitioner's counsel was not based on the improper dual standard. It is true that Judge Duke referred to the dual standard which he stated was found in federal decisions. His decision however did not rest on these cases or on the now disapproved of less stringent standard

for retained counsel. Prior to making reference to this practice in the federal courts, Judge Duke cited *Pitts* v. *Glass*, 231 Ga. 638, 203 S.E.2d 515 (1974) as delineating the standard in Georgia for determining the effective assistance of counsel ("counsel reasonably likely to render and rendering reasonably effective assistance"). He then stated that the "Fifth Circuit Court of Appeals in *MacKenna* v. *Ellis*, 286 F.2d 592, 599 (5th Cir. 1970), interpreted this standard more fully to mean 'not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' " (Order of Judge Duke at p.51). *Both* of these Fifth Circuit cases dealt with *appointed* counsel, *not* retained counsel. As explained *supra*, under the old dual system the standard for determining the effectiveness for appointed counsel was more stringent than that for retained counsel. Consequently, by citing *Pitts* and *MacKenna* as the applicable standard for determining whether petitioner had effective assistance of counsel, Judge Duke applied the harder "appointed counsel" standard to Mr. Hawkins, even though Mr. Hawkins was *not* appointed. If anything, this would tend to militate in petitioner's favor; thus, there can be no inference that Mr. Hawkins "got off easy" by being judged effective under a dual system subsequently discredited by the Supreme Court of the United States.

(2) **Jury Composition**

Petitioner alleged in Paragraph 90-92 of her petition that she was indicted and convicted by grand and traverse juries drawn from jury boxes from which women were unconstitutionally excluded. The Magistrate suggests that there is no merit to these claims. In her objections petitioner contends that she was deprived of constitutionally

adequate representation in said jury boxes of her peers—women—because of a state statute allowing women to opt out of jury service; she says that statutory procedure was a "clear denial of Basic Due Process rights and the right to a trial by a representative jury." According to petitioner, the fact that the relevant statute (Georgia Code Ann. § 59-124, Repealed by Acts 1975, pp. 779, 780) was not attacked prior to the U. S. Supreme Court decision in *Duren* v. *Missouri*, 439 U.S. 357 (1979) does not make that statute any less unconstitutional as to her and said jury boxes. Finally, petitioner contends that *Duren* "merely clarified" *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In considering petitioner's contention as to the composition of the jury boxes—as far as women are concerned—it is important to look at the chronology of events from 1975 to the present: In January of 1975, the United States Supreme Court in *Taylor* held that a statute automatically *excluding* women from jury service unless they *opted* to be included by filing a written request for jury service, was unconstitutional. In February 1975, petitioner was tried and convicted, and on March 1, 1975, she was sentenced to death. Georgia Code Ann. § 59-124 was repealed by Acts 1975, pp. 779, 780. After exhausting her avenues of direct appeal, petitioner on January 9, 1978, filed a petition for writ of habeas corpus in the Superior Court of Baldwin County. On January 9, 1979, the United States Supreme Court in *Duren* decided that a state statute which allowed women by request to *opt out* of jury service was unconstitutional.

As suggested by the Magistrate, *Taylor*—although decided before this case came to trial—is not applicable because it does not reach the question at issue here. The

statute struck down in *Taylor* was an "opt-in" statute; *i.e.* women were automatically *excluded* from the jury list unless they opted to serve. Georgia Code Ann. § 59-124, was an "opt-out" statute, meaning that women were automatically *included* unless they opted *not* to serve. It is this "opt-out" type of statute which was held unconstitutional in *Duren*. Consequently, the issue presented here is whether *Duren*, decided approximately four years after petitioner's trial, will be applied retroactively to her case.

In determining whether or not *Duren* should be applied retroactively to this case, the court need only look to a case decided by the Supreme Court six days after *Duren*. In *Harlin* v. *Missouri*, 439 U.S. 459, 58 L.Ed.2d 733, 99 S.Ct. 709 (1979) a case involving a statute like Ga. Code Ann. § 59-124, Justice Powell in his opinion concurring in the judgment expressed the view that the wisest approach in fashioning a satisfactory retroactivity doctrine "contemplates . . . that courts apply a new rule retroactively in cases still pending on direct review, whereas cases on collateral review ordinarily would be considered in light of the rule as it stood when the conviction became final." 439 U.S. at 460 (citation omitted).

In the present case the "new rule" is the *Duren* decision, which rendered invalid opt-out statutes like Ga. Code Ann. § 59-124. It would apply to petitioner's case if her case was "still pending on *direct* review." (emphasis added). However, there can be no argument that petitioner's case is before this court on *collateral* review, and it was in that posture at the time the "new rule" (*Duren*) was made. As a result it must be considered "in light of the rule as it stood when the conviction became final." 439 U.S. at 460. When petitioner's conviction became final the rule was that although "opt-in" statutes were

unconstitutional, "opt-out" statutes were constitutionally sound.

Because *Duren* is not applicable to petitioner's case it was not necessary for the Magistrate to consider whether or not the three elements of a prima facie case established by *Duren* had been met. This court is in agreement with and adopts the remainder of the Magistrate's proposed findings as to this contention, including the finding that petitioner has failed to show that anything other than Georgia Code Ann. § 59-124 contributed to the under-representation of women in said jury boxes.

(3) Application of the Death Penalty

In his proposed findings and conclusions the Magistrate recommended that petitioner's claims that the death penalty as applied in her case is unconstitutional be denied. Petitioner now contends that the Magistrate mistakenly relied on *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978). Petitioner claims that "[t]hat case is no longer good law but has been effectively overruled by *Godfrey* v. *Georgia*, 446 U.S. 420 (1980)" which, according to petitioner, "entirely destroys the legal premise upon which *Spinkellink* was based." A reading of both of these cases does *not* call for the conclusion demanded by the petitioner. *Spinkellink* is obviously in harmony with *Godfrey* and consequently remains good law.

Other Contentions

On Pages 28 and 29 of her objections to the proposed findings and conclusions petitioner lists five contentions which she claims the Magistrate failed to address "to any meaningful degree" to wit: (1) the death sentence is unconstitutionally cruel and unusual punishment as applied

to her, a co-conspirator non-trigger person in Florida at the time of the killings; (2) petitioner's consititutional rights were violated by a conviction-prone jury; (3) petitioner's constitutional rights were violated in that she did not receive a noncapricious sentencing process; (4) petitioner received the death penalty in a manner which discriminated on the basis of race, geography, and poverty; and (5) the jury which convicted and sentenced petitioner did not believe that she would be executed.

After reading the record of the proceedings below, and after considering petitioner's brief as to these contentions, this court is convinced that these contentions are not accurate statements of what occurred in her conviction and sentencing proceedings, and that they are without possible merit. At best they are arguments pertaining to matters not found in this record.

Based upon the proposed findings of fact and conclusions of law of the Magistrate which are adopted by this court, and upon the considerations and determinations above-stated, the court concludes that petitioner is entitled to neither an evidentiary hearing nor to a writ of habeas corpus.

Accordingly, Rebecca A. Machetti's petition for habeas corpus relief is hereby DENIED IN ITS ENTIRETY.

SO ORDERED, this 26th day of June, 1981.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

[Filed at 11:45 A.M., June 29, 1981.
Helen F. Newberry, Deputy Clerk, U.S. District Court, Middle District of Georgia]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, *Petitioner,* vs. L. Q. LINAHAN, Warden, Georgia Women's Correctional Institution, *Respondent.*	CIVIL ACTION NO. 79-210-MAC

JUDGMENT

Pursuant to the Opinion and Order of this Court dated June 26, 1981 and filed June 29, 1981, and for the reasons stated therein, the petition for a writ of habeas corpus of REBECCA A. MACHETTI, a/k/a REBECCA A. SMITH, is denied in its entirety.

This 29th day of June, 1981.

GIRARD W. HAWKINS, Clerk

By: /s/ HELEN F. NEWBERRY
HELEN F. NEWBERRY
Deputy Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF BALDWIN, STATE OF GEORGIA.

REBECCA A. SMITH a/k/a REBECCA A. MACHETTI, *Petitioner.* v. HAROLD L. HURLEY, Acting Warden, Georgia Women's Correctional Institution, *Respondent.*	Civil Action File No. 13548. Habeas Corpus.

ORDER

The above styled case came on for hearing on February 1, 1978, and March 1, 1978, in the Superior Court of Baldwin County, Georgia. Upon consideration of the petition and evidence presented, it appears as follows:

FINDINGS OF FACT

The Petitioner, Rebecca A. Smith, a/k/a Rebecca A. Machetti, is presently incarcerated in Georgia Women's Correctional Institution in Milledgeville, Georgia. On March 1, 1975, the Petitioner was sentenced to death following her conviction for the murders of Joseph Arnold Akins and Juanita Knight Akins, in the Superior Court of Bibb County, Georgia, by Judge C. Cloud Morgan.

The Petitioner appealed her conviction to the Supreme Court of Georgia. On January 6, 1976, the Supreme Court of Georgia affirmed the convictions of the Petitioner in Smith v. The State, 236 Ga. 12 (222 S.E. 2d 308) (1976).

The Petitioner filed for a writ of certiorari in the United States Supreme Court on September 11, 1976. On November 1, 1976, the United States Supreme Court denied the Petitioner's petition for writ of certiorari in Smith v. Georgia, ___U.S.___, 97 S.Ct. 339. On January 10,

1977, the United States Supreme Court in Smith v. Georgia, ___U.S.___, 97 S.Ct. 771, denied Petitioner's petition for re-hearing.

On January 13, 1977, the Petitioner petitioned the Superior Court of Bibb County, Georgia, for a declaratory judgment and/or a pre-sentence hearing and a stay of execution. The Superior Court of Bibb County, Georgia, denied the petition. The Petitioner then appealed this decision to the Supreme Court of Georgia, which stayed the Petitioner's execution pending appeal. The Supreme Court of Georgia denied the Petitioner's appeal on April 7, 1977, and denied the motion for re-hearing in Smith v. The State, 238 Ga. 655 (235 S.E. 2d 3751).

On July 15, 1977, the Petitioner filed a petition for writ of certiorari in the Supreme Court of the United States. On October 3rd, 1977, the United States Supreme Court denied the petition for writ of certiorari in the case of Smith v. Georgia, ___U.S.___, 98 S. Ct. 232. On November 14, 1977, the United States Supreme Court further denied Petitioner's petition for re-hearing in the case of Smith v. Georgia, ___U.S.___ 98, S. Ct. 496.

On January 9, 1978, the Petitioner filed in this Court a petition for writ of habeas corpus. The Respondent, Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, was duly served on January 11, 1978. The Respondent filed his answer in this Court on February 1, 1978.

Remittitur in Petitioner's case was issued to the Superior Court of Bibb County on December 2, 1977, and filed on January 4, 1978. Petitioner's execution was set for January 20, 1978.

On January 9, 1978, this Court issued an order staying the execution of the Petitioner, Rebecca A. Smith a/k/a

Rebecca A. Machetti, which stated: "On application for a stay of execution of the sentence of death imposed upon the Petitioner by the Superior Court of Bibb County, Georgia, and scheduled to be carried out at the Georgia State Prison on January 20, 1978, it is hereby ordered, that the application for a stay is hereby granted, and the Petitioner's execution scheduled for January 20, 1978, is hereby stayed until further order of this Court. It is further ordered that the Clerk shall give immediate notice by telephone and by telegraph to the Respondent Warden, and to the Attorney General of the State of Georgia, that the Petitioner's execution is stayed by the order of this Court."

On February 1, 1978, a hearing was held in this Court concerning the Petitioner's motions for appointment of experts authorized for investigation, and continuance, and motion for costs and expenses to pursue habeas corpus relief. On February 8th, 1978, nunc pro tunc as of February 1, 1978, this Court denied the Petitioner's motion for appointment of experts authorized for investigation, and motion for costs and expenses necessary to pursue habeas corpus relief. However, this Court did grant on February 8, 1978, nunc pro tunc as of February 1, 1978, Petitioner's motion for a continuance, and it was ordered that the petition for writ of habeas corpus be heard on March 2nd, 1978, in this Court.

After the hearing on March 2, 1978, the matter was taken under advisement. Counsel of Record for Petitioner and Respondent requested time to submit argument by briefs after the transcript of the hearing had been completed, which was accomplished and filed on April 3, 1978, in the Office of the Clerk of the Superior Court of Bald-

win County, Georgia. A Post-Hearing Brief on behalf of Petitioner was filed on or about May 31, 1978. Thereafter An Additional or Supplemental Post-Hearing Brief on behalf of Petitioner on recent decisions of Lockett and Bell was filed on July 10, 1978, and no Response Brief on behalf of Respondent was filed thereto.

As stated, the Court agreed to take the case under advisement and has since been delayed in completing and filing this order due to heavy caseload and trial docket of the Courts in this multi-county Circuit, and also due

* * * * *

It appears to this Court that the provisions of 27-2518, *supra*, will require the setting of a new date within the time limits therein provided once all of the appeal, habeas corpus and other remedies have been exhausted. It appears to this Court that the execution was not carried out on the 15th day following receipt in the trial court of the remittitur from the Supreme Court of Georgia, and that this is at this point, a moot allegation. A moot case is one that seeks to determine an abstract question, which does not arise upon existing facts and rights. Byrd v. Equitable Life Assurance Society, 185 Ga. 628 (196 S. E. 63). Therefore, this contention of the Petitioner is moot, and without merit.

XI.

The next issue raised by Petitioner is that the imposition and execution of Petitioner's death sentences violates the Sixth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec I, Paragraphs I, XI, and XI of the Constitution of the State of Georgia, by denying her trial by representative way. The Petitioner alleges that she was deprived of her fundamental right to

indictment and trial by a jury selected from a representative cross-section of the community, and the failure of her trial counsel to object to the composition of the traverse or grand jury pools deprived her of her right to the effective assistance of counsel. In her petition for writ of habeas corpus the Petitioner alleges the following facts: (1) The sentences were imposed pursuant to the verdict of a jury selected through procedures that systematically excluded from jury service all persons having conscientious or religious scruples against capital punishment, without sufficient individualized examination of the beliefs of each particular excluded venireman; (2) The sentences were imposed pursuant to the verdict of a jury from which all persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross-section of the community; (3) All persons having conscientious or religious scriples against capital punishment were systematically excluded from the jury which determined Petitioner's guilt or innocence, thereby depriving Petitioner of a vital constitutional right, her right to a jury selected from a representative cross-section of the community, without furthering any permissible state interest; (4) She was convicted and sentenced to die by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt of the crimes with which she was charged; (5) Under Section 59-112 of the Georgia Code, women who are housewives with children 14 years of age or younger may be excused from jury duty merely by request; men in a similar status do not have a comparable right. The test which must be applied was set out by the Supreme Court of Georgia in Pass v. Caldwell, 231

Ga. 192 (1973) (200 S.E. 2d 720), which held: "It was held in United States v. Hyde, 448 F.2d 812, 824 that the defendant always has the burden of showing jury discrimination. Evidence of 'spectacular' underrepresentation meets the burden, making a prima facie case of discrimination. The burden of going forward then shifts to the government to explain the figures in a non-discriminatory way. The requirements for making out a prima facie case of jury discrimination are two fold. First, appellant must prove that an opportunity for discrimination on account of race existed on the grounds that the source from which the potential jurors was drawn was racially biased, and second, that the use of such an 'infected source' produced a significant disparity between the percentages of blacks found present in the source and those actually appearing on applicant's grand and petit jury panels." Also see: Whitus v. Georgia, 385 U.S. 545 (87 S.C. 643, 17 L.E. 2d 599); Wright v. Smith, 474 F. 2d 349, 351 (5th Cir. 1973); and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690, in which the Supreme Court said: "It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement but that petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. Foy v. United States, 342 U.S. 261, 284 (867 S.Ct. 1613, 1625, 91 L.Ed. 2d 2043) (1947); Apadaca v. Oregon, 406 U.S. at 414, 92 S.Ct. at 634 (Purality Opinion); but the jury rules, pools of names, panels, or venires from which the juries are drawn, does not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." The evidence presented at the habeas corpus hearing of the Pe-

titioner shows that the traverse jury was composed of the requisite twelve members, of whom one was a female, and three were black. Both Mr. Adam Greene, Clerk of the Superior Court of Bibb County at the time the jury utilized in the Petitioner's trial was established, and Mr. K. B. Hardwick, Jr., foreman of the jury commission who established the jury box utilized in Petitioner's trial, were present at the Petitioner's habeas corpus hearing and testified concerning the establishment of this jury box. The jury commission at the time was composed of six male jury commissioners, two of whom were black. The jury commission set forth steps to be used in revising the jury box in 1973 which was admitted into evidence at the habeas corpus hearing. Mr. K. B. Hardwick, Jr. testified at the habeas corpus hearing concerning the specific procedures utilized in compiling the grand and traverse juries. First, he testified that the names of prospective jurors from the outgoing box would be drawn and then from the voter registration list the commissioner would obtain as many names as possible and send out questionnaires for prospective jurors. In addition to the voter registration list, the jury commissioners also used personal knowledge, the city directory and telephone calls, to supplement this list and insure a representative cross-section. He stated that only the females that requested exclusion were eliminated from the jury list. In addition to other supplementation, the jury commission would make spot checks of the list to determine if blacks and females were represented in fair proportion. The five commissioners were divided in teams to compare the male-female and black-white ratio to see if the jury list was running in proper balance. Petitioner's Exhibit No. 3 reveals that in order to prove the black ratio, the following was done: "(a) The voter list was gone over for names of apparently qualified

blacks to whom questionnaires were sent but who did not return it: 'Setup' cards were made up and included. (b) Some 'borderline' whites were pulled." The evidence shows that the jury box in effect at the time of the Petitioner's trial was established on February 27, 1974. The evidence also shows that the entire traverse jury box was selected from the registered voters list, and that a survey of the number of blacks and women in the box was made only about three-fourths of the revision of the names. At the time of the survey, the box was composed of 19% blacks and 18% women. In 1970 census reported 34% blacks in Bibb County, and 54% of Bibb County's population was female. It appears to this Court from the testimony and evidence presented that the Petitioner has now shown that an opportunity for discrimination existed from the source of the jury list, and secondly, though they show some disparity between the percentages of blacks and women in the traverse and grand jury boxes and the percentages of blacks and women in the population, the Petitioner has not shown the significant disparity necessary for finding that a jury was non-representative. As to the ineffective assistance of counsel claim, it appears to this Court that since there was no illegality in the composition of the juries, Counsel was not ineffective in failing to challenge the juries as being non-representative. Therefore, this Court concludes from the testimony and evidence presented, that the contentions of the Petitioner are without merit.

XII.

The next contention raised by the Petitioner is that she was convicted on the basis of information obtained in violation of her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the

Constitution of the United States, and Art. I, Sec. I, Paragraph XIII of the Constitution of the State of Georgia. The Petitioner contends: (1) Evidence was offered against the Defendant at the trial consisting of statements made by the Defendant to law enforcement officers; (2) The said statements of the Defendant to law enforcement officers were incriminatory as to the question of the existence of aggravating circumstances and to the question of guilt, in that statements were introduced regarding the Defendant's knowledge of the existence of certain insurance policies and statements were introduced regarding the Defendant's providing the officers with an alibi for persons accused of the actual act of killing; (3) The said statements were made involuntarily to the officers and without the proper warnings regarding the Constitutional rights of the Defendant with respect to self-incrimination and representation by counsel. This Court has made a thorough examination of this allegation of the Petitioner. From the testimony and evidence presented to this Court, this Court cannot find any violation of Petitioner's privilege against self-incrimination under the United States Constitution or the Constitution of Georgia. Therefore, the contention of the Petitioner is without merit.

After hearing all the evidence in this case, and based upon the findings of fact and conclusions of law in this order, this Court concludes that none of Petitioner's constitutional rights were violated and that Petitioner's conviction and death sentences are lawful and Petitioner is not being illegally held nor detained without proper authority.

THEREFORE, IT IS CONSIDERED, ORDERED, AND ADJUDGED, because of the above stated reasons,

that Petitioner's Motion for Writ of Habeas Corpus, be, and the same is hereby, denied, and Petitioner is remanded to the custody of Harold L. Hurley, Acting Warden, Georgia Women's Correctional Institution, Respondent, for further action appropriate to law.

It is further ORDERED that the stay of execution entered by this Court on January 9, 1978, is hereby dissolved, and that a copy of this order be served upon the Honorable C. Cloud Morgan, Judge, Superior Courts, Macon Judicial Circuit, and Honorable Donald Thompson, District Attorney, Macon Judicial Circuit.

SO ORDERED, this 9th day of May, 1979.

/s/ JOSEPH B. DUKE

JOSEPH B. DUKE
Judge, Superior Courts
Ocmulgee Judicial Circuit